

# Congress of the United States

## House of Representatives

Washington, DC 20515-2107

November 3, 2003

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The Honorable Nils J. Diaz  
Chairman  
Nuclear Regulatory Commission  
Washington, D.C. 20555

Dear Mr. Chairman:

I am writing to request additional information about allegations of retaliation against whistleblowers in the Commission's Region IV Arlington, Texas offices. As you know, I have been trying to help resolve these issues since May 22, 2001 when I first wrote the Commission. I sent a subsequent letter on March 11, 2003. While I am pleased to learn that one of these cases has since been settled, I am frustrated that the other two remain stuck in bureaucratic limbo, and just as frustrated that the Commission's response to my March 2003 letter contains inaccurate and misleading information. Because of these serious problems, I request your personal review of this situation.

In its consideration of H.R. 6 (the Energy bill) the House Energy and Commerce Committee added bipartisan provisions that address many of the loopholes highlighted by these cases. The Committee was motivated in part by the Commission's actions in the Region IV whistleblower cases. In the wake of the events of September 11, 2001, it is particularly vital that the NRC foster a work environment that rewards whistleblowers for their courage in disclosing safety, security, or criminal violations. Instead, the Commission continues to punish these brave individuals. In light of the fact that the House of Representatives voted to pass H.R. 6 containing these provisions, I request that you not only refrain from taking further adverse action against these whistleblowers, but also that you embrace the policy goals of the provisions and immediately enter into good-faith settlement negotiations with them.

As you know, in February 2001 the U.S. Secret Service and the NRC Office of the Inspector General (OIG) conducted a raid on the Region IV offices after several whistleblowers disclosed evidence of criminal wrongdoings there. The raid resulted in the arrests of NRC employees Guy Compton, Dean Papa and Joseph Tapia, all of whom were convicted, pled guilty, or entered into a deferred prosecution agreement with the U.S. Department of Justice. As you know, several of the employees and contractors who provided the allegations and cooperated with the investigation of the wrongdoing have since been fired.

For three whistleblower cases related to the criminal wrongdoing described above, I asked on March 11, 2003 that you provide me with a variety of information on the history and status of the complaints. On April 18, 2003, you responded to my letter. While your response stated that the "Commission will take prompt and appropriate action to address violations of the law by its officials and will act to remedy significant management concerns," the Commission's actions in two of these three cases seem to indicate otherwise. Consequently, I ask that you

provide me with comprehensive responses to the following questions about the two unresolved cases, as well as the requested clarifications to your April 18, 2003 response.

### **Ron Bath**

On May 22, 2001 I wrote you regarding the concerns of Ron Bath, who was terminated in December 2000 after his letter to the NRC Regional Administrator detailing abuses of authority, criminal misconduct and security weaknesses was divulged to his employer. You responded on June 13, 2001, stating that the "Commission is prepared to act if there is a need for timely and effective management intervention." As you may recall, Mr. Bath was fired at the request of Dean Papa, who pled guilty to engagement in criminal activity after Mr. Bath's disclosures. Mr. Bath filed a complaint pursuant to 41 U.S.C. Section 265 (e), but the NRC concluded that because Mr. Bath was a contractor employee who blew the whistle on NRC employee misconduct, rather than misconduct of his own contracting company, he has no legal recourse. Since Mr. Bath was not an NRC employee, he has no administrative recourse through the Merit Systems Protection Board. Finally, since his employer is not a licensee, he has no recourse through the U.S. Department of Labor remedial scheme either. I find this outrageous. While the NRC evidently allowed all those who were indicted to resign from their jobs so as not to besmirch their federal employment records, Mr. Bath's case remains in administrative limbo, and he has been denied justice. Adding even more outrage to this situation is the fact that the Commission has now *rehired* Mr. Tapia, apparently as a result of Mr. Tapia's retirement being revoked and the Commission's willingness to accommodate his financial hardship. I cannot understand the reasoning behind this gross inequity.

Please respond to the following specific questions:

- 1) Your April 18, 2003 response states that Mr. Bath's employer, Roy Thompson of U.S. Robotech, terminated him for "budgetary and strategic planning purposes," implying that Mr. Thompson reached an independent decision to terminate Mr. Bath. However, both the OIG report and Mr. Thompson's testimony indicate that Mr. Bath was terminated at the direction of NRC's Region IV management, specifically by Dean Papa, one of the NRC Region IV managers who was arrested on charges of making and selling counterfeit satellite television access cards on government time.
  - a) Do you agree with the conclusions of the OIG report regarding the reason for Mr. Bath's termination? If not, why not?
  - b) Do you believe that Mr. Thompson's testimony regarding the fact that he terminated Mr. Bath at the direction of NRC Region IV management is false or inaccurate? If so, why?
  - c) Is it true that despite Mr. Bath's termination letter stating "budgetary and strategic reasons" for the decision to terminate him, there was in fact no decrease in the value of the contract between U.S. Robotech and the NRC at the time?

- d) Why did your response to my question regarding the reason Mr. Bath was terminated fail to mention that the OIG had concluded that Mr. Bath was terminated as a direct consequence of his disclosures of criminal activity on the part of Region IV managers?
  - e) Mr. Thompson's testimony to the OIG stated that Mr. Bath's termination was due in part to the disclosure to him by the NRC of Mr. Bath's November 17, 2000 letter to NRC Regional Administrator Ellis Merschoff setting forth a number of safety and mismanagement concerns. Do you believe this portion of Mr. Thompson's testimony to be false or inaccurate? If so, why?
  - f) Mr. Merschoff also acknowledged to the OIG that he believed the NRC's disclosure to Mr. Thompson probably had something to do with his termination. Do you believe this statement by Mr. Merschoff is false or inaccurate? If so, why?
  - g) Mr. Papa also told the OIG that he believed Mr. Bath's disclosure cost Mr. Bath his job. Do you believe this statement by Mr. Papa is false or inaccurate? If so, why?
  - h) If the Commission agrees with the conclusions of several involved individuals as well as the OIG that Mr. Bath was terminated as a result of his disclosure of impropriety by NRC employees, why does the NRC continue to stall the resolution of Mr. Bath's whistleblower case?
- 2) Your letter indicates that Mr. Bath's Federal Tort Claims Act complaint is currently under consideration. It was filed on April 22, 2002, well over a year ago. Mr. Bath provided the Commission with additional material that the Commission has now had in its possession for over 9 months. In the meantime, Mr. Bath has lost his house, his car, his health insurance, his ability to pay for his children's education, and his personal credit. When exactly do you plan to enter into settlement discussions or undertake other action to resolve his case? Please provide a timeline.
- 3) Your response states that "NRC senior management did address the manner in which Region IV management elected to handle Mr. Bath's disclosure." In what specific ways was this addressed?

### **Lanell Allen**

Ms. B. Lanell Allen was hired by an NRC contractor in October 1995 to provide support services to the Region IV office, and like Ron Bath, Ms. Allen was terminated at the direct request of Region IV, on March 5, 2002. When the NRC OIG and the Secret Service were investigating the Region IV personnel, Ms. Allen reported security risks to the NRC computer network and otherwise assisted with the investigation. I am informed that Ms. Allen was initially denied unemployment compensation, remained unemployed for 8-9 months and suffered serious depression. Because she was an NRC contractor like Mr. Bath, her options to obtain remedy are

very limited. She filed a Federal Tort Claims Act suit on September 9, 2002, but thus far her case remains unresolved.

Recently the OIG concluded that although Ms. Allen raised serious concerns about NRC security issues and vulnerabilities at several nuclear facilities, since her concerns were not about contractual improprieties she does not have a remedy under 41 U.S.C. Section 265 (e). Like Mr. Bath, Ms. Allen apparently has no legal recourse or protections available to her to protect her from the retaliatory actions of NRC Region IV managers who directed that her contract be terminated.

- 4) The Commission characterized Ms. Allen's March 5, 2002 termination by her employer, EER Systems Inc., as due to "performance and conduct issues." However, the NRC itself notified EER of allegations of "potential performance and conduct issues" *made by Ms. Allen to the NRC*. Ms. Allen alleges that her termination was made solely on the basis of her assistance to the OIG.
  - a) Specifically what "performance and misconduct issues" led to Ms. Allen's termination?
  - b) Has the OIG completed its investigation of Ms. Allen's allegations? If so, please provide a copy of the report. If not, when will it be completed?
  - c) Your response states that "Region IV management was aware of the involvement of only one individual in Region IV in providing support and assistance to the OIG during its investigation" of the criminal matters, implying that Region IV was not aware of Ms. Allen's involvement. However, Ms. Allen spoke with both Regional Administrator Ellis Merschoff and Deputy Regional Administrator T. Patrick Gwynn several times about her involvement, and also requested that the OIG keep Region IV management apprised of her involvement. Why did your response inaccurately state that only one individual was known to have been assisting the OIG in its investigation?
  - d) In the now-resolved whistleblower case brought by Peter Krayner, Division of Resource Management and Administration Director Kathleen Hamill stated that "Lanell Allen, contractor, brought concern about illegal activity (presumably the satellite card) and time card fraud to Mr. Gwynn." How do you explain the contradiction between this statement and your statement to me that Region IV managers were only aware of one individual's involvement in the OIG's investigation?

### **NRC's Whistleblower Policy**

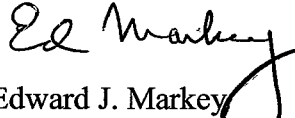
During debate on H.R. 6 (the Energy bill) Energy and Commerce Committee Chairman Tauzin, Congressman Barton and I worked out language (see section 14033) that ensures that NRC employees, contractors and subcontractors would be entitled to the same levels

of whistleblower protection as NRC licensee employees and provides the whistleblower with the option to seek remedy in civil court if their case is not ruled on in a timely manner. Does the Commission support these provisions? If not, why not?

- 1) In your response, you state that in situations where the contractor wrongly decides to terminate one of its employees at the direction of an NRC employee, that decision may be unlawful retaliation by the contractor, but the NRC bears no responsibility for the contractor employee's termination. Of course, since the NRC could always terminate the contract entirely if the contractor failed to comply with the direction, one could argue that NRC does in fact wield a great deal of power over the personnel decisions of its contractors. As such, why would the NRC object to language that ensures that contractor employees cannot be subject to retaliation by NRC employees for disclosures of security, safety or criminal violations? Wouldn't such protections do much to foster the "open door policy" towards whistleblowers that the Commission claims to have? If not, why not?
- 2) In your response, you state that there is no need for additional whistleblower protections for contractor employees because of the existence of protections under 41 U.S.C. 265 (e). However, this provision only provides for protection in cases where the whistleblower raised concerns related to the *contract on which he or she worked*. How exactly would this provision protect Mr. Bath or Ms. Allen, both of whom raised criminal allegations about misconduct by NRC employees that were unrelated to the contracts on which they worked? If this provision would not assist Mr. Bath or Ms. Allen, why do you think additional clarifying legislation is unnecessary?
- 3) Is it the view of all Commissioners that no legislative remedy is necessary to ensure that contractor employees are provided with the same level of whistleblower protections as NRC licensee employees? If not, which Commissioners hold which view?

I again urge you to take expeditious action to resolve these complaints in a manner that is acceptable to both sides. Please provide me with the requested information no later than close of business on November 17, 2003. Thank you for your consideration of this important matter. If you have any questions or concerns, please have your staff contact Dr. Michal Freedhoff or Dr. Colin McCormick of my staff at 202-225-2836.

Sincerely,

  
Edward J. Markey  
Member of Congress

CC: The Honorable W. J. "Billy" Tauzin, Member of Congress  
The Honorable Joe Barton, Member of Congress  
The Honorable Edward McGaffigan, Jr., Commissioner  
The Honorable Jeffrey S. Merrifield, Commissioner